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No. 80-1664

In The

Supreme Court of the United States

October Term, 1980

CONSUMERS UNION
OF UNITED STATES, INC., et al.,
Appellants,

v.

VIRGINIA STATE BAR, et al.,
Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

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MOTION TO DISMISS OR AFFIRM

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QUESTION PRESENTED

Did the District Court abuse its discretion under the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988, in determining that special circumstances existed rendering an award of attorneys' fees against the Virginia State Bar unjust?

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MOTION TO DISMISS OR AFFIRM

The appellee Virginia State Bar moves to dismiss the appeal herein on the ground that the Court lacks jurisdiction to entertain the appeal. In the alternative, the Virginia State Bar moves to affirm the judgment of the District Court on the ground that the questions on which the decision of the cause rests are so unsubstantial as not to need further argument.

STATEMENT OF CASE

On February 27, 1975, Consumers Union of United States, Inc., and Virginia Citizens Consumer Council (herein referred to as "Appellants") filed this action in the

United States District Court for the Eastern District of Virginia. Their complaint alleged that the Supreme Court of Virginia and the Virginia State Bar had violated their rights under the first and fourteenth amendments and 42 U.S.C. § 1983 to gather and publish, and their members' right to receive, certain information relating to legal services. Appellants sought declaratory and injunctive relief. A three-judge District Court was convened on April 14, 1975.

In June, 1975, the Virginia State Bar appointed a committee to study lawyer advertising and DR 2-102(A)(6), the disciplinary rule which was challenged in this case. The committee recommended substantial changes to the rule which would have allowed much greater dissemination of information concerning legal services to consumers. After careful study, including review of amendments proposed by the American Bar Association to its Code of Professional Responsibility, the Virginia State Bar adopted the recommendations of its committee. On April 6, 1976, the Virginia State Bar petitioned the Supreme Court of Virginia to amend DR 2-102(A)(6). Two weeks later, the Supreme Court of Virginia summarily denied the petition to amend the rule.[1]

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[1] In their Jurisdictional Statement, Appellants quote from the Memorandum in Support of Petition for Rehearing filed in the District Court by the Supreme Court of Virginia which characterized the Virginia State Bar's petition to amend DR 2-102(A)(6) as "a reflexive response to the ABA's action . . . submitted without supporting documentation." *See* Jurisdictional Statement at 6. The Virginia State Bar took exception to this characterization of its petition and requested a hearing should the District Court desire further evidence that its proposed amendment to the Disciplinary Code had been well-considered. Memorandum in Support of State Bar Defendants' Opposition to Plaintiffs' Motion for Attorneys' Fees and Costs at 6. The District Court did not deem such a hearing to be necessary. The record in this case supports the Virginia State Bar's contention that

On December 17, 1976, the District Court held the disciplinary rule unconstitutional in part, but upheld that portion of the rule prohibiting publication of fees charged for services, other than an initial consultation. Appellants appealed to this Court that part of the decision upholding the prohibition against fee advertising. The Supreme Court of Virginia and the Virginia State Bar cross-appealed on the ground that the rule should have been upheld in its entirety.

While the appeals were pending, *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977) was decided. In *Bates* this Court held for the first time that the advertising of fees for routine legal services was constitutionally protected. On June 29, 1977, the judgment of the District Court was vacated and remanded for further consideration in light of *Bates.*

Following the decision in *Bates,* the Virginia State Bar promptly sought an opinion from the Attorney General of Virginia concerning the enforceability of disciplinary rules dealing with lawyer advertising and published the opinion in the *Virginia Bar News,* a publication distributed to all attorneys practicing in Virginia. The Virginia State Bar also reactivated its committee on advertising and hired an outside consultant to aid it in proposing amendments to the disciplinary rules which would comply with the new constitutional guidelines.

Both the Virginia State Bar and the Supreme Court of Virginia proposed entry of a decree enjoining enforcement of DR 2-102(A)(6), since after the *Bates* decision it was

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the proposed amendment was a carefully deliberated attempt to bring the rule into compliance with what were deemed at that time to be applicable constitutional standards.

obvious that the rule was unconstitutional. Indeed the Virginia State Bar had not supported enforcement of DR 2-102(A)(6) even before *Bates* as was evidenced by its petition to the Supreme Court of Virginia to amend the rule.

On May 8, 1979, the District Court ruled that the disciplinary rule was unconstitutional on its face and enjoined its enforcement. The District Court ordered the Supreme Court of Virginia and its Chief Justice, in his official capacity, to pay Appellants' costs and reasonable attorneys' fees. Since the Virginia State Bar had petitioned the Supreme Court of Virginia to amend DR 2-102(A)(6) to conform to what it deemed to be constitutional standards, the District Court held that special circumstances existed which would render a fee award against the Virginia State Bar unjust.

The Supreme Court of Virginia appealed to this Court from the judgment of the District Court on the ground that it was immune from the suit and the fee award. Appellants cross-appealed the District Court's decision not to award attorneys' fees and costs against the Virginia State Bar.

The Court noted probable jurisdiction in the appeal taken by the Supreme Court of Virginia, and the immunity issue was fully briefed and argued. The cross-appeal regarding whether the District Court had abused its discretion in not awarding attorneys' fees against the Virginia State Bar was neither briefed nor argued.

On June 2, 1980, this Court upheld entry of the injunction against the Supreme Court of Virginia but vacated the fee award because it was premised on legislative acts for which the Supreme Court of Virginia enjoyed absolute legislative immunity. The case was remanded for further

proceedings. On June 9, 1980, this Court vacated the decision of the District Court not to award fees against the Virginia State Bar and remanded the case for further consideration in light of its decision in *Supreme Court of Virginia* v. *Consumers Union of United States, Inc.*, 446 U.S. 719 (1980). *Consumers Union of United States, Inc.* v. *Virginia State Bar*, 447 U.S. 901 (1980).

On remand, the District Court awarded Appellants attorneys' fees from the Supreme Court of Virginia and its Chief Justice, in his official capacity, based on their enforcement role. The District Court found that because of the endeavors of the Virginia State Bar to have the disciplinary rules amended, special circumstances existed which would render an award of attorneys' fees against it unjust.

On January 28, 1981, the Supreme Court of Virginia appealed the award of attorneys' fees against it to this Court and to the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit"). On February 4, 1981, Appellants filed a notice of appeal to this Court and to the Fourth Circuit from the decision of the District Court not to award attorneys' fees and costs against the Virginia State Bar.

MOTION TO DISMISS

Appellee Virginia State Bar moves to dismiss this appeal on the ground that the Court lacks jurisdiction. Appellants rely on 28 U.S.C. § 1253 as the statutory basis for jurisdiction. Section 1253 confers juridiction on the Court solely over appeals from the order of a three-judge district court granting or denying an injunction. The decision of the District Court not to award attorneys' fees against the Virginia State Bar is not an order granting or denying an injunction. The attorneys' fees question is the sole issue

raised in this appeal. This Court noted in *Supreme Court of Virginia* v. *Consumers Union of United States, Inc.*, 446 U.S. at 737 n. 16 (1980) that it "would not have appellate jurisdiction under 28 U.S.C. § 1253 to decide the attorneys' fees question had it alone been appealed."[2] This position accords with the holdings in a number of recent decisions, *see, e.g., Carey* v. *Wynn*, 439 U.S. 8 (1978); *MTM, Inc.* v. *Baxley*, 420 U.S. 799 (1975); *Gonzalez* v. *Automatic Employees Credit Union*, 419 U.S. 90 (1974), in which this Court has narrowly construed its appellate jurisdiction under Section 1253.

Citing *Vendo Co.* v. *Lektro-Vend Corp.*, 434 U.S. 425 (1978), Appellants suggest that jurisdiction lies in this Court to correct a mistake by the District Court in the application or construction of the Court's mandate. Jurisdiction may not be premised on this ground, however, because the District Court has fully complied with the mandate of the Court.[3] On remand the District Court received additional argument from the parties concerning the existence of special circumstances which might render a fee award unjust and reexamined its prior holding in light of the analytical framework provided by this Court in *Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. 719 (1980). Acting within the discretion granted to it under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, the District Court ordered the Supreme Court of Virginia and its Chief Justice, in his official ca-

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[2] *Weiser* v. *White*, 505 F.2d 912 (5th Cir. 1975) and *Haining* v. *Roberts*, 453 F.2d 1223 (5th Cir. 1971), *cert. denied*, 406 U.S. 948 (1972), cited by the Appellants in support of jurisdiction, are *contra*. The Fifth Circuit had itself cast doubt on this precedent in *United States* v. *Louisiana*, 543 F.2d 1125 (5th Cir. 1976).

[3] Contrary to Appellants' assertion, Jurisdictional Statement at 3, this Court did not rule that the District Court "erred" in finding that a fee award against the Virginia State Bar would be unjust.

pacity, to pay Appellants a reasonable attorneys' fee but determined anew that special circumstances existed which rendered an award of fees against the Virginia State Bar unjust.

Appellants agree that the Court lacks jurisdiction to hear this appeal. Jurisdictional Statement at 4. Since no jurisdictional basis exists for the appeal, it should be dismissed.

MOTION TO AFFIRM

Alternatively, the Virginia State Bar moves that the Court affirm the judgment of the District Court on the ground that the questions on which the decision of the cause depends are so unsubstantial as not to require further argument.

The Civil Rights Attorney's Fees Awards Act of 1976 provides that in any action or proceeding to enforce the provisions of 42 U.S.C. § 1983, "the Court, *in its discretion,* may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs" (emphasis added). In exercising its discretion, the District Court applied the standard of *Newman* v. *Piggie Park Enterprises,* 390 U.S. 400, 402 (1968), that attorney's fees should ordinarily be awarded "unless special circumstances would render such award unjust." App. 5.

In light of this Court's decision in *Supreme Court of Virginia* v. *Consumers Union of United States, Inc.,* the District Court reconsidered the propriety of a fee award against the Virginia State Bar and concluded that special circumstances exist which would render such an award unjust. The District Court grounded its conclusion on the Virginia State Bar's "endeavors to have the Bar Code amended to conform to constitutional standards." App. 4. Furthermore, the District Court found that the Virginia State Bar acts merely as an administrative agency of the Supreme Court

of Virginia which is the "fundamental source and conduit of disciplinary enforcement authority." App. 5.

The Civil Rights Attorney's Fees Awards Act of 1976 makes an award of attorney's fees discretionary with the District Court. In enacting this legislation Congress considered and rejected mandatory fees to prevailing parties.[4] It is so clear that the District Court did not abuse its discretion in denying an award of attorneys' fees against the Virginia State Bar that affirmance of the judgment without full briefing and argument is warranted.

[4] *See* H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 3, 8 (1976).

CONCLUSION

For the reasons stated herein, this appeal should be either dismissed or affirmed.

Respectfully submitted,

VIRGINIA STATE BAR
JAMES C. ROBERTS, President of the Virginia State Bar
ALEX MAYO, Chairman of the Legal Ethics Committee, Virginia State Bar
Appellees.

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